

# JOURNAL

## PUBLIC LAW

An Official Publication of the State Bar of California Public Law Section

Vol. 27, No. 3  
Summer 2004

### MCLE SELF-STUDY

## Trademarks and the City (or Other Public Entity)

By Susan Pollyea, Esq.\*

Trademarks are not just for private commercial manufacturers and merchants. Numerous public entities have adopted and are using trademarks.

Among public entities in California, the Los Angeles County Department of the Coroner uses the mark SKELETONS IN THE CLOSET for its boutique and on-line store selling items such as toe tag key rings, toy replicas of its 1938 hearse (the "Black Mariah") and boxer shorts called "undertakers." The Municipal Water District of Orange County uses the mark TRAVELLING WITH RICKI THE RAMBUNCTIOUS RAINDROP (Design) for educational services in the field of water use and conservation. The City of Pasadena uses its ROSE BOWL marks to promote stadium facilities for sporting events, concerts and recreational activities, as well as on goods such as sunglasses, refrigerator magnets, mouse pads, wallets, hats, golf gloves and footballs. ANAHEIM ADVANTAGE is a mark the City of Anaheim uses for public utility services. SOME THINGS CAN ONLY HAPPEN HERE is a mark the City of Beverly Hills uses to promote business, tourism, community, cultural and entertainment attractions.

Public entities outside of California are also using trademarks for their products and services. PRISON BLUES is the Oregon Department of Corrections' mark for its line of jeans, shorts, slacks, sweat pants and shirts. The State of Illinois uses the mark LAND OF LINCOLN for license plates. CRADLE OF DEMOCRACY is a mark the South Carolina Department of Parks, Recreation and Tourism uses to promote business and tourism.

A search of the U.S. Patent and Trademark Office database reveals applications and registrations for thousands of such marks owned by public entities.

### I. WHAT IS A TRADEMARK?

A trademark is a distinctive word, name, symbol or device adopted and used by a manufacturer or merchant, or by a public entity, to identify itself as the source of goods and distinguish them from those sold or manufactured by others.<sup>1</sup> A service mark is a distinctive word, name, symbol or device used in the sale or advertising of services to identify the services of one person or entity and distinguish them from the services of another.<sup>2</sup> Since most of the same legal requirements apply to trademarks and service marks, both will be referred to in this article as "trademarks" or simply "marks."

A collective mark is a mark used by members of a group or organization to identify the member's own goods or services and distinguish them from those of non-members, and to indicate membership in the group.<sup>3</sup> For example, CLEAN CITIES (Design), a collective mark of the U.S. Department of Energy, is used to indicate membership in an association of government and industry partners providing information and training regarding alternative fuel vehicles and refueling infrastructures.

A certification mark is a mark used by a person *other than its owner* to certify origin, standards of material, mode of manufacture or quality, or to confirm that the performer of the services or manufacturer of the goods has met certain standards or belongs to a certain

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[www.calbar.ca.gov/publiclaw](http://www.calbar.ca.gov/publiclaw)

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organization.<sup>4</sup> Examples of certification marks are REAL CALIFORNIA CHEESE (Design) and CALIFORNIA KING SALMON (Design), owned by the California Department of Food and Agriculture. Another example is the U.S. Army's CAPACITY FALLOUT SHELTER (Design) certification mark, which assures that fallout shelters bearing the mark have been found by civil defense authorities to conform to federally defined technical requirements.

Typically, marks are words, phrases, logos or graphic designs. A mark may also consist of letters, numbers, a sound, a smell, a color, a product shape, the design or appearance of a building, the appearance of a delivery or passenger vehicle, or any other non-functional, distinctive device used to promote and distinguish products or services in the marketplace.<sup>5</sup> A domain name, such as the Los Angeles County Department of Public Works' WWW.888CLEANLA.COM, may serve as a mark as long as it is used and promoted as an identifiable source of specific products or services, rather than merely as a domain address on the Internet. A cartoon character may also serve as a mark. One example is the California Department of Conservation's RECYCLE REX, a "spokedinosaur" that promotes public awareness of the need for beverage container recycling. Another example is the City of Manhattan Beach's STOPPER, an animated stop sign-shaped character used to provide traffic safety information to the public.

A mark has four basic functions: (1) identify the products or services of a seller and distinguish them from those sold or provided by another; (2) signify that goods bearing the mark, or services rendered in connection with the service mark, come from or are controlled by a single source; (3) serve as a guarantee that the goods or services are of a consistent level of quality; and (4) serve as an instrument to advertise and sell the products or services.<sup>6</sup> Part of the law of unfair competition, trademarks promote competition and maintenance of consistent quality products, and prevent consumers from being confused or deceived in the marketplace.<sup>7</sup>

Clients sometimes mistakenly ask their lawyers for a "patent on a name" or to have a "trademark copyrighted." In general, trademarks are tools of trade that identify commercial origin, while copyrights protect literary and artistic expression, and patents protect functional and design inventions.

## II. TRADEMARK BENEFITS

Revenue generation is one reason municipalities, states and federal agencies adopt

and use trademarks. Public entities can use marks as tools of trade for creating goodwill in the minds of consumers about the source of the goods and the reputation of the provider, symbolized by a mark. Justice Frankfurter famously noted that trademarks serve a psychological, sometimes subconscious, function to convey the desirability of the commodity in the minds of potential consumers.<sup>8</sup> Marks such as THE QUEEN MARY (Design), owned by the City of Long Beach and used for binoculars, stationery, ice buckets and other items, convey desirability and help create demand for goods and services.

Another means for a public entity to generate revenue is to license use of its trademarks to others. This allows a public entity to avoid manufacturing and selling the marked goods itself, as in the case of the HEARST CASTLE COLLECTION mark, which has been licensed by the California Department of Parks and Recreation to Pindlers & Pindlers, a high-end interior design house, for use on tapestries and luxury chenille and damask upholstery fabrics distributed wholesale to interior decorators and designers.<sup>9</sup>

Trademark licensing is permitted without loss of trademark rights as long as the licensor maintains "adequate control over the nature and quality of the goods and services sold under the mark" by the licensee.<sup>10</sup> Without quality control, the promise of a guarantee is false and the goods are not truly "genuine."<sup>11</sup> "Naked" licensing, which is licensing without adequate control, is considered abandonment of the trademark and results in loss of trademark rights.<sup>12</sup> In addition to or as part of quality control, a public entity may include a requirement that the licensee's use of the mark not disparage the entity's image, as in the case of police and fire department marks licensed for use in motion pictures and television dramas.<sup>13</sup>

Trademarks may also provide a medium for a public entity to present an image or convey a message. The U.S. Army's ARMY OF ONE and BE ALL YOU CAN BE marks, and the Air Force's NO ONE COMES CLOSE mark, inspire consumers to associate these motivational, empowering messages with the goods and services, as well as their sources. The Department of the Interior uses the mark TAKE PRIDE IN AMERICA for anti-litter, fire prevention, volunteer recruitment and other campaigns, and for award programs. In three years, the agency generated more than 12 million hours of volunteer labor, which it estimates translated into savings of more than \$140 million to local, state and federal governments.<sup>14</sup>

Public entities have a compelling interest in protecting consumers from being deceived

about the source or authenticity of goods and services. As discussed above, certification marks are used to certify the standards of fallout shelters, as well as the origin, standards and quality of California cheese, king salmon and sour cream. Trademarks may also be useful to public entities in protecting consumers from deception in other public safety matters, such as preventing misuse of military, law enforcement and fire department badges, tags and medallions by unauthorized persons. The Los Angeles City Attorney recently stopped sales of a genuine L.A. Fire Chief's badge and helmet on eBay and counterfeit L.A.P.D. badges on other websites, based on trademark rights and the risk of harm to the public's safety.<sup>15</sup> San Francisco and New York, as well as the U.S. Army, actively police their official logos and marks to prevent misuse and harm to public safety due to consumer deception.<sup>16</sup>

## III. TRADEMARK SELECTION

As discussed above, a word, symbol or device must be "distinctive" with respect to the goods or services in order to function as a mark. Marks are classified as to distinctiveness, also a synonym for "strength," which is the "tendency to identify the goods sold under the mark as emanating from a particular, although possibly anonymous, source."<sup>17</sup> The distinctiveness or strength of a mark, "determines both the ease with which it may be established as a valid trademark and the degree of protection it will be accorded."<sup>18</sup>

The most distinctive classes of marks are "fanciful" marks, which are the strongest kind of marks, and "arbitrary" marks, which may not be quite as strong as fanciful marks. Not quite as strong as either fanciful marks or arbitrary marks, but still inherently distinctive, are "suggestive" marks. "Descriptive" marks are not inherently distinctive, but may become distinctive if they acquire distinctiveness through extensive use or advertising. "Generic" terms are not capable of becoming distinctive, may never function as a trademark to indicate origin<sup>19</sup> and are in the public domain.<sup>20</sup>

A fanciful mark is a word that is coined for the sole purpose of serving as a mark and connotes nothing about the product or its use.<sup>21</sup> Some examples are KODAK, XEROX and YUBAN. This kind of mark is very rare, especially for public entities. NIOSHTIC, the Center for Disease Control's mark for a computerized database of occupational safety and health literature, might arguably be considered a fanciful mark, although consumers may recognize the "niosh" portion of the mark as an acronym for the National Institute of Occupational Health and Safety, making the mark at least somewhat descriptive of the database services.

An arbitrary mark is a word that may be in common linguistic use, but when used with the goods or services, does not suggest or describe any ingredient, quality, or characteristic of the goods or services.<sup>22</sup> Some examples are SNAP, used by the Virginia Department of the Treasury for financial investment services, SMILES (Stylized), used by the South Carolina Department of Parks, Recreation and Tourism for promotional services and certain goods, and MATE (Design), used by the Air Force for computer controlled electronic testing and measuring units. An arbitrary mark may not suggest or describe anything with reference to the product or service, but it may be in common use as a mark in its own or other product fields, and therefore be “weak” or diluted.<sup>23</sup> An example of this is GUARDIAN, the Army’s mark for a newspaper devoted to information of interest to the Fort Polk community. Although GUARDIAN is arbitrary and non-descriptive with respect to newspapers, it is a common mark both for newspapers and for numerous other goods and services. Thus, the mark is weak and would be entitled to only a narrow scope of protection, probably limited to newspapers in the Fort Polk region.

A descriptive mark is a word, symbol or device that gives information about the intended purpose, function, use, size, nature or characteristics of the goods or services, the type of consumer, or the effect upon the user.<sup>24</sup> Highly descriptive or laudatory marks are often considered “weak” marks and given only a narrow range of protection. A descriptive mark may become distinctive only if it acquires “secondary meaning,” that is, due to extensive use or advertising, it comes to be recognized by consumers as identifying the source of the goods or services.<sup>25</sup> Examples of descriptive marks with secondary meaning or acquired distinctiveness are the Department of the Treasury’s UNITED STATES MINT mark for numismatic coins and medals, the California Department of Commerce’s THE CALIFORNIAS mark for chamber of commerce services, and the City of Los Angeles’ L.A. MARATHON mark for clothing and for organizing and operating marathon races. The name of a geographic location is a descriptive term. In most cases, a mark containing a primarily geographically descriptive term must either acquire secondary meaning or contain another non-descriptive term to function as a mark.

A “suggestive” mark is a word, symbol or design that is distinctive but suggests a quality or ingredient of the goods or services,<sup>26</sup> a kind of middle ground between purely fanciful marks and descriptive marks.<sup>27</sup> Courts usually apply the “degree of imagination” test to distinguish suggestive marks from descriptive

ones: “A term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of the goods. A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods.”<sup>28</sup> Examples of suggestive marks are MATH STAR (Design), the L.A. County Office of Education’s mark for providing online courses of instruction for mathematics teachers, and ASK JOAN OF ART!, the Smithsonian’s mark for an interactive online art reference service. Most trademarks are suggestive of the goods or services to some extent.<sup>29</sup>

Fanciful marks receive the strongest judicial protection, because the case for infringement is clear if a third party starts using a similar mark on related goods. From a marketing perspective, however, a fanciful mark is often unacceptable, because it requires introducing a new term into the lexicon of the consumer and may require an intensive advertising campaign for consumers to associate it with a certain source of a product or service. Descriptive marks are very popular because they help sell or advertise the product or service by telling the consumer something about it. From a legal perspective, non-descriptive marks are best because they can be more easily protected.<sup>30</sup>

In selecting a mark, public entities should also consider the likelihood of confusion of a proposed mark with other marks already in use by others on similar or related goods and services. “Likelihood of confusion” is the test for common law, Lanham Act, and many states’ statutory trademark infringement. Among other factors, the degree of similarity of the public entity’s proposed mark to a senior user’s mark should be compared with respect to similarity of pronunciation, appearance and meaning.<sup>31</sup> The degree of similarity between the public entity’s goods or services and those of the senior user should also be considered. If the parties’ respective goods are *highly* similar, then *less* similarity between the marks is necessary for confusion to be likely. If the parties’ respective goods or services are *less* similar, then *more* similarity between the respective marks is necessary for a likelihood of confusion.<sup>32</sup>

When screening a potential new mark by comparing it to similar marks of senior users, public entities should also consider the potential for “dilution.” Dilution is the weakening or reduction in the ability of a well-known mark to clearly identify its source, even when the senior user’s goods or services are not similar or related, or there is no likelihood of confusion. Dilution weakens the “strength” of the mark, either by “blurring” its product identification, or by “tarnishing” or damaging

the positive associations of the mark.<sup>33</sup> A public entity should avoid adoption of a mark that is highly similar to a well-known senior user’s mark, even for unrelated goods and services. For example, a public entity would be advised to avoid such hypothetical uses of marks as “Tiffany” for paper goods or building inspection services, or “United States Mint” for snack chips and candy sold in the municipal court snack shop, or any use of “Godzilla,” “Mickey Mouse” or other well known characters in the department newsletter.

#### IV. PROPER USE OF A TRADEMARK

Proper use of a mark is important because, in the United States, legal rights to a trademark arise automatically through use. In fact, the U.S. rule of priority between trademark owners of the same or similar marks is based on first to use, rather than first to register. Rights in a federally registered mark are forfeited “[w]hen any course of conduct by the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services . . . in connection with which it is used, or otherwise to lose its significance as a mark.”<sup>34</sup> Courts apply the same principle whether or not the mark has been registered.

With proper use, a trademark will remain the exclusive property of its owner forever. However, if consumers treat the mark as the name of the product or service, it will no longer serve to identify and distinguish the goods of one source. Then the mark becomes the generic term for the goods and is in the public domain for everyone to use. Well-known examples of trademark loss by conversion into a generic term are aspirin, escalator, shredded wheat, thermos, cellophane, lanolin, linoleum, kerosene and milk of magnesia. Most of these originated as coined, fanciful trademarks. In fact, the inherent legal danger of using a fanciful mark on a new and unfamiliar product is that buyers will use the mark as the generic name of the new product itself.<sup>35</sup>

To preserve trademark rights, a trademark always must be identified as a trademark and distinguished from the generic name of the product. Some guidelines for conveying a distinct commercial impression of a symbol of origin include: (1) add a generic term after the trademark, e.g., HEARST CASTLE COLLECTION tapestries; (2) display the mark typographically to give it a special appearance, e.g., using all capital letters or initial capitals, enlarged or boldface type, a distinctive print style or color, and a prominent position on labels or advertising

copy;<sup>36</sup> (3) use the mark only as an adjective, never as a noun or verb, or in plural or possessive forms; and (4) be consistent in the format and spelling of the mark, use of hyphens, and the number of words.

In the case of products, the mark should be affixed either directly to the product, to containers or packaging for the product, or to tags or labels attached to the product. Service marks should be displayed on advertisements, brochures, signs and invoices for the services.

A public entity should also display the appropriate trademark notice with the mark in advertising and labeling. If the mark is registered in the U.S. Patent and Trademark Office ("PTO"), the notice should appear either with the words "Registered in U.S. Patent and Trademark Office," the words "Reg. U.S. Pat. & Tm. Off." or the letter R enclosed within a circle.<sup>37</sup> If a mark is not registered in the PTO, the public entity may use a footnote stating "Trademark," or the letters TM or (SM for service mark) in small capital letters on the upper right shoulder of the mark, in the same position a footnote reference symbol would appear.

Proper and continuous use of a mark, whether registered or unregistered, is necessary to preserve a public entity's trademark rights. Non-use of a mark with the intention not to resume will result in abandonment of the mark.<sup>38</sup> A licensee's use of the mark with quality control by the public entity licensor constitutes use and preserves the public entity's rights in the mark. As noted above, licensing of the mark without quality control results in loss of rights in the mark.

## V. TRADEMARK REGISTRATION

A public entity may register its marks with the PTO or within the state. A state registration has limited value, however, to public entities engaged in interstate commerce or commerce with another country because, generally, federal trademark rights supersede state rights.

In order to register a mark with the PTO, the mark must be in use in commerce that Congress may regulate, i.e., interstate, foreign or territorial commerce.<sup>39</sup> Most public entities,<sup>40</sup> including city, regional and state entities, that use their marks in connection with services provided to visitors and tourists from other states, territories and countries, or in connection with goods sold online, satisfy this requirement.

Although unregistered marks are protected under common law, a number of

advantages flow from owning a federal registration on the Principal Register. These include: (1) trademark registration is constructive notice of the registrant's claim of ownership; (2) the registrant may bring infringement action in federal courts; (3) registration is prima facie evidence that the registered mark is valid, that the owner of the registration owns the registered mark, that the registrant has exclusive rights to use the mark in commerce, and that the registered mark is not confusingly similar to other registered marks; (4) the registration is incontestable after five years; (5) profits, damages and costs are recoverable and treble damages and attorney fees are available in federal court; (6) the registrant may file applications for registration in other countries, the European Union and the Madrid Protocol with priority based on the U.S. registration; and (7) the U.S. registration may be used to stop importation of goods bearing infringing marks.<sup>41</sup> An additional practical consideration for public entities is that registration of a trademark makes it a more valuable asset for licensing.

## CONCLUSION

Numerous public entities in California and throughout the United States are using trademarks to generate revenue, convey public service messages, foster interest and participation in services provided for the public benefit, increase their exposure, and prevent consumer confusion and deception about the origin and authenticity of their products and services. Used properly, a public entity's valuable symbols of trade can be preserved for its exclusive use forever.

## ENDNOTES

1. Lanham Act § 45, 15 U.S.C. § 1127; see also Trademark Manual of Examining Procedure ("TMPE"), U.S. Department of Commerce, Patent and Trademark Office, § 101.
2. Lanham Act § 45, 15 U.S.C. § 1127; see also, TMPE, supra note 1 at § 102.
3. 15 U.S.C. § 1054; TMPE, supra note 1 at § 103.
4. 15 U.S.C. § 1054; TMPE, supra note 1 at § 106.
5. See J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (4th Ed. 2004), §§ 7:10-7:110.
6. Id. Ch. 3.
7. Id. Ch. 2.
8. Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge, 316 U.S. 203, 205 (1942).

9. See <http://www.pindler.com/hearst.htm>.
10. McCarthy, supra note 5 at § 18:42.
11. Id.
12. Id. § 18:48.
13. Brenda Sandburg, "Asset Management," The Recorder, July 7, 2004.
14. See <http://www.takepride.gov/aboutus.html>.
15. Sandburg, supra note 13.
16. Id.
17. McGregor-Doniger, Inc. v. Drizzle Inc., 599 F.2d 1126, 1131 (2d Cir. 1979) (citations omitted).
18. Id.
19. McCarthy, supra note 5 at § 12:1.
20. Id. § 12:2.
21. Id. §§ 11:5-11:8.
22. Id. § 11:11.
23. Id. § 11:14.
24. Id. § 11:16.
25. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992).
26. McCarthy, supra note 5 at § 11:62.
27. Id. § 11:64.
28. Stix Prods., Inc. v. United Merchants & Mfrs., Inc., 295 F.Supp. 479, 488 (S.D.N.Y. 1968).
29. McCarthy, supra note 5 at § 11:65.
30. Id. Ch. 11.
31. Id. §§ 23:21-23:60.
32. Id. § 23:20.
33. Id. Ch. 24.
34. Lanham Act § 45, 15 U.S.C. § 1127.
35. McCarthy, supra note 5 at § 11:9.
36. Id. § 3:3.
37. 15 U.S.C. § 1111.
38. McCarthy, supra note 5 at §§ 17:11-17:14.
39. 15 U.S.C. § 1051.
40. Id. § 1052.
41. McCarthy, supra note 5 at § 19:9.

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# MCLE SELF-ASSESSMENT TEST

1. PRISON BLUES is the Oregon Department of Correction's mark for its clothing line.  
☐ True ☐ False
2. Most of the same legal requirements apply to trademarks and service marks.  
☐ True ☐ False
3. A certification mark is used by the owner of the mark to certify origin, standards of material, mode of manufacture or quality.  
☐ True ☐ False
4. A domain name may be used as a mark even if it is used merely as a domain address on the Internet.  
☐ True ☐ False
5. Among other functions, a mark serves as a guarantee that the goods or services are of a consistent level of quality.  
☐ True ☐ False
6. Trademarks generally identify commercial origin, while copyrights protect literary and artistic expression, and patents protect functional and design inventions.  
☐ True ☐ False
7. Justice Holmes famously noted that trademarks serve a psychological, sometimes subconscious, function to convey the desirability of the commodity in the minds of potential consumers.  
☐ True ☐ False
8. The HEARST CASTLE COLLECTION mark is owned by the Hearst family.  
☐ True ☐ False
9. Public entities can generate revenue by licensing use of their trademarks to others.  
☐ True ☐ False
10. Enforcement of trademark rights is a means for public entities to prevent misuse of law enforcement and fire department badges by unauthorized persons.  
☐ True ☐ False
11. "Fanciful" and "arbitrary" marks are equally strong.  
☐ True ☐ False
12. KODAK, XEROX and YUBAN are examples of descriptive marks.  
☐ True ☐ False
13. A word, symbol or device that gives information about the nature of goods or services is a descriptive mark.  
☐ True ☐ False
14. A "suggestive" mark is a kind of middle ground between purely fanciful marks and descriptive marks.  
☐ True ☐ False
15. From a legal perspective, descriptive marks are best because they can be more easily protected.  
☐ True ☐ False
16. Public entities cannot be liable for diluting a senior user's interest in a mark.  
☐ True ☐ False
17. With proper use, a trademark will remain the exclusive property of its owner forever.  
☐ True ☐ False
18. To preserve trademark rights, a trademark must periodically be identified as a trademark and distinguished from the generic name of the product.  
☐ True ☐ False
19. A public entity may register its marks only with the U.S. Patent and Trademark Office.  
☐ True ☐ False
20. Federal registration of a trademark on the Principal Register is incontestable after five years.  
☐ True ☐ False

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# Living Wage Ordinances: Alive and Kicking

By Daniel S. Connolly, Esq.\*

Living wage ordinances (“LWOs”), while unique, are becoming more popular among local public entities not just in California<sup>1</sup> but across the nation. A LWO typically concerns a public entity’s service contracts. The ordinance establishes a “living wage” that is adjusted annually by a consumer price index. Most LWOs also provide for a minimum number of paid and unpaid days off.

Not surprisingly, the popularity of LWOs has spawned a concomitant increase in constitutional challenges. Some of these challenges have recently resulted in a California superior court order affirming the constitutionality of the City of Hayward’s LWO,<sup>2</sup> a published Ninth Circuit decision upholding an amendment to the City of Berkeley’s LWO,<sup>3</sup> and a New Mexico district court decision rejecting constitutional challenges to the City of Santa Fe’s LWO.<sup>4</sup> These decisions attest to the viability of LWOs as a means for local public entities, as a policy matter, to address issues of poverty and to improve the quality of procured services by establishing minimum compensation and benefit levels for their contractors’ employees.

## I. HAYWARD

The Hayward LWO defines a “service contract” as “any contract with the City, including a purchase order, for an expenditure in excess of twenty-five thousand dollars” for certain enumerated services ranging from “automobile repair and maintenance” to “landscaping” to “security services.”<sup>5</sup> It defines a “service contractor” as “any contractor who seeks or has been awarded a service contract subject to this ordinance” and it includes “all subcontractors retained by a contractor to perform any or all of the functions covered by a service contract.”<sup>6</sup> It defines a covered “employee” as any individual employed by a service contractor “on or under” the authority of any contract for services with the city or any proposal for such contract.<sup>7</sup>

Hayward’s LWO provided for an initial unadjusted living wage of eight dollars per hour (if health benefits are paid to employees) or nine dollars and twenty-five cents per hour if health benefits are not provided.<sup>8</sup> The living

wage is adjusted upward each July 1 to reflect the change in price of the Bay Area Consumer Price Index.<sup>9</sup> The ordinance requires a service contractor to provide a minimum of twelve compensated and five uncompensated days off per year.<sup>10</sup> Insofar as a remedy is concerned, the ordinance gives an employee who claims a violation a private right of action, to include a remedy for retaliation, and it includes an award of attorney’s fees and costs to the prevailing employee.<sup>11</sup>

For several years, Hayward contracted with Cintas to provide uniform and laundry services for its employees. As part of the arrangement, Cintas certified in writing its intention to comply with the city’s LWO. In *Amaral v. Cintas*, plaintiffs Francisca Amaral and Nelva Hernandez (on behalf of themselves and all others similarly situated) filed suit against Cintas, their employer, for violations of the LWO, Labor Code Section 200 et seq., Business and Professions Code Section 17200 et seq. and for breach of contract.<sup>12</sup>

Cintas answered the complaint with a general denial and a number of affirmative defenses. Those defenses included allegations that state and federal laws preempt the LWO; that the LWO violates the state constitution because it falls outside the city’s authority and because of its extraterritorial application; and that the LWO violates the equal protection guarantees of the federal and state constitutions. Hayward intervened, and Cintas filed a motion for summary judgment or, in the alternative, for summary adjudication, arguing in part the following: that the LWO on its face is not intended to apply to facilities located outside Hayward’s territorial boundaries or to persons who do not live or work in the city; that the extraterritorial application of the LWO (to a Cintas facility located outside the city’s municipal boundaries) violates Article XI, Section 7 of the California Constitution;<sup>13</sup> that the LWO is a regulatory as opposed to a proprietary exercise of power and that the city was not making a decision as a “market participant” would but was carrying out policy objectives; and, that the city’s exercise of its contracting power to impose certain terms and conditions did not concern city-owned

property and is inconsistent with case law.<sup>14</sup> The superior court denied Cintas’ motion and found the LWO to be a constitutional exercise of the city’s authority to specify the terms of its contracts without regard to whether the performance of the work on the contract takes place within or outside the city’s boundaries.

In its analysis, the court first noted that the terms of the LWO did not exclude Cintas’ contract with Hayward by limiting its requirements to agreements involving performance within the city’s boundaries or by city residents. Next, the court determined that the LWO on its face was not unconstitutional. In a facial challenge, the court can only consider the text of the measure itself, not its application to the particular circumstances of the individual, and the challenging party must demonstrate that “the act’s provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.”<sup>15</sup> A successful facial challenge requires that there not be any circumstances under which the ordinance would be constitutionally valid.<sup>16</sup> In this case, the court found that the LWO did not conflict with Article XI, Section 7 because, on its face, it “did not purport to exercise its power outside its City limits” and it would be valid if “applied to a city contractor whose facility was within the Hayward City limits.”

The court then discussed an “as applied challenge” to the LWO. Such a challenge “contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right.”<sup>17</sup> In this instance the court found the as applied challenge, based upon the extra-territoriality limitation of Article XI, Section 7, to be without merit.<sup>18</sup> Cities have been permitted by appropriate charter amendments to acquire autonomy with respect to all municipal affairs.<sup>19</sup> A charter city such as Hayward gains exemption under Article XI, Section 5<sup>20</sup> with respect to its municipal affairs from the “conflict with general laws” restriction of Article XI, Section 7.<sup>21</sup>

In its analysis and in conjunction with the Section 5 exemption, the court cited *In re Blois*<sup>22</sup> for the proposition that municipalities “may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality.”<sup>23</sup> According to the court, the city’s mode of contracting—as established by the minimum compensation and benefit levels of its LWO—is a municipal affair over which the city exercises plenary power.<sup>24</sup> Because this mode of contracting is “essential to the proper conduct of the affairs of the municipality,”<sup>25</sup> the court found the exercise of a city’s police power outside of its territorial boundaries to be permissible when it was necessary to its affairs and noted that “[s]uch affairs would include entering into and administering its own contracts.” The court concluded that Hayward has the power, either through its proprietary or police powers, to specify its contracting terms through ordinance, as it did with the LWO.

The court thus found Hayward’s LWO to be a lawful enactment and did not reach any of the defendants’ other arguments.

## II. BERKELEY

In *RUI One Corporation v. City of Berkeley*, the Ninth Circuit held that Berkeley’s LWO, as amended with the so-called “Marina Amendment,” survived challenges alleging violations of the Contract Clause of the federal constitution, and the Equal Protection and Due Process Clauses of the federal and state constitutions.

Unlike the *Cintas* case, though, *RUI One Corporation* did not address constitutional challenges to Berkeley’s LWO per se; indeed, *RUI* conceded that Berkeley could regulate wages by way of its LWO. The court’s focus was on the Marina Amendment and its impact on existing leases for businesses in the Berkeley Marina.<sup>26</sup>

Berkeley enacted its LWO in 2000, and like the Hayward LWO, it mandated employers with city contracts to pay minimum hourly wages and benefits to their employees. Unlike Hayward’s LWO, Berkeley’s LWO also extends to employers who receive some form of financial benefit from the city (such as lessees of city property and city financial aid recipients) and who satisfy certain specified criteria such as number of employees and annual revenues. It was assumed at the time of its adoption that the LWO would be implemented for lessees of city property upon renewal of their leases.

The Marina Amendment refers to an amendment to Berkeley’s LWO that required

employers who leased land located within the Marina (and who satisfied certain income and employee criteria) to comply immediately with the LWO. In this case, *RUI One Corporation* leased land from the city for its restaurant, and it was ultimately assigned a fifty-year lease that expired in 2018.

In its lawsuit, *RUI One Corporation* first maintained that the Marina Amendment violated the federal constitution’s Contract Clause. In responding to that claim, the Ninth Circuit stated:

“Whether a regulation violates the Contract Clause is governed by a three step inquiry: The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. If this threshold inquiry is met, the court must inquire whether the State, in justification, [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem, to guarantee that the State is exercising its police power, rather than providing a benefit to special interests. Finally, the court must inquire whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.”<sup>27</sup>

The Ninth Circuit further noted that the issue of “contractual impairment” has three components: “whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.”<sup>28</sup> While *RUI One Corporation* obviously has a contractual relationship with Berkeley, it failed to establish that the Marina Amendment impaired any specific or implied terms of the lease agreement or any of the agreement’s “expected benefits.” Furthermore, the court emphasized that a state’s authority to regulate wages and employment conditions is well within its police powers, and it opined that a state cannot contract away its police powers.<sup>29</sup> Absent a finding that the Marina Amendment impaired *RUI One Corporation*’s lease, the court concluded that there was no violation of the Contract Clause.

*RUI One Corporation* also raised an equal protection challenge under the federal and state constitutions, claiming that the Marina Amendment unfairly targeted it. The Ninth Circuit ruled that, because the Marina Amendment did not concern a suspect class or fundamental right, the issue was whether there is “any reasonably conceivable state of

facts that could provide a rational basis for the classification.” In this instance, the Ninth Circuit reviewed the “findings” of the Marina Amendment to find no equal protection violation, concluding that “[i]t is more than reasonable that the City should expect Marina businesses, which receive so many benefits from the City in the form of improvements and lack of competition due to the development moratorium, and which operate on land held in the public trust, to contribute to the welfare of the surrounding community and not to exacerbate its problems.”<sup>30</sup>

The Ninth Circuit also rejected *RUI One Corporation*’s final argument that the opt-out provisions of the LWO and the Marina Amendment (which enabled bona fide collective bargaining agreements to opt out of the LWO) deprived it of due process by effectively delegating the city’s legislative power to unions. The court reiterated the proposition that “[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection.”<sup>31</sup> The court concluded “a provision allowing employees bargaining collectively to opt out of the provisions of a labor regulation is not a delegation of legislative power at all.”<sup>32</sup> The court concluded that the opt-out provisions of the LWO and the Marina Amendment were not a legislative delegation but simply a “condition of the ordinance’s application.”

In rejecting all of *RUI One Corporation*’s constitutional challenges, the Ninth Circuit affirmed the district court’s decision upholding the ordinance.

## III. SANTA FE

In a case challenging the constitutionality of the LWO adopted by Santa Fe, New Mexico, the First Judicial District Court in New Mexico issued a “Decision and Order” upholding the LWO.<sup>33</sup> Santa Fe’s LWO required employers licensed or registered to do business in Santa Fe and with twenty-five or more employees to pay a minimum wage. A group of these employers filed suit to challenge the LWO on various grounds.

Rather than delve into the court’s discussion of the New Mexico Constitution, suffice it to say, for purposes of this article, that the court found the Santa Fe LWO was enacted “incident to an exercise of independent municipal power,” specifically the “power to promote health, safety and welfare” conferred upon the city by the New Mexico Constitution. Such power is not unlike the police power referenced by the

court in Cintas. In response to an equal protection challenge based on the size of the employer, the court found that the twenty-five employee classification was not arbitrary and unreasonable under the rational basis test. The court found a legitimate governmental interest in creating the classification and limiting the LWO's application initially to a relatively smaller number of larger businesses while still affecting a majority of the workers. The court also rejected a challenge by plaintiffs that the LWO amounted to a "taking or damaging" of their property in violation of the New Mexico Constitution. In doing so, the court concluded that, because the LWO does not physically invade or appropriate the plaintiffs' property for the government's own use, and even though LWO compliance requires a covered employer to expend its own monies, it does not amount to a taking requiring government compensation. In upholding the LWO's constitutionality, the court directed that, in the interests of justice, it be made effective "prospectively only."

## CONCLUSION

Whether as an exercise of a community's police power or its power to enter into contracts, a LWO is an effective means to ensure that certain groups of employees receive a minimum wage and a minimum level of benefits, be it healthcare and/or paid and unpaid time off. So far, LWOs have survived attacks on several different constitutional fronts, and if their survival at this juncture is any indication of future survivability, they will be "alive and kicking" well into the future.

## ENDNOTES

1. In California, the cities of Hayward, Berkeley, Los Angeles, Oakland, Santa Cruz, West Hollywood, as well as the Town of Fairfax and the City and County of San Francisco, have all enacted LWOs. Hayward: Chapter 2, Article 14 (Sections 2-14.010 et seq.) of the Hayward Municipal Code; Berkeley: Chapter 13.27 of the Berkeley Municipal Code; Los Angeles: Div. 10, Ch. 1, Art. 11 of the Los Angeles Administrative Code; Oakland: Chapter 2.28 of the Oakland Municipal Code; Santa Cruz: Chapter 5.10 of the Santa Cruz Municipal Code Ch. 5.10; West Hollywood: Art. 2, Ch. 7 of the West Hollywood Municipal Code; Town of Fairfax: Chapter 8.50 of the Fairfax Town Code Health and Safety; City and County of San Francisco: Ch. 12R of the San Francisco Administrative Code.

2. *Amaral v. Cintas*, Alameda County Superior Court, Case No. HG03 103046, the Honorable Steve A. Brick.
3. *RUI One Corporation v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004).
4. *New Mexicans for Free Enterprise*, the Santa Fe Chamber of Commerce, et al. v. The City of Santa Fe, First Judicial District Court, County of Santa Fe, Cause No. D-0101-CV-2003-468, the Honorable Daniel A. Sanchez.
5. Hayward Municipal Code, Chapter 2, Article 14, Section 2-14.010(f).
6. Id. Chapter 2, Article 14, Section 2-010(f)/(g).
7. Id. Chapter 2, Article 14, Section 2-14.010(c).
8. Id. Chapter 2, Article 14, Section 2-14.020(c). Currently, the living wage (with health benefits provided) is \$9.26 per hour; without health benefits, it is \$10.71 per hour.
9. Id.
10. Id. Chapter 2, Article 14, Section 2-14.020(d).
11. Id. Chapter 2, Article 14, Section 2-14.040(a).
12. The case has not yet been certified as a class action.
13. Article XI, Section 7 of the California Constitution provides as follows: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." See also *City of Oakland v. Brock* 8 Cal. 2d 639, 641 (1937).
14. See *Air Transport v. City and County of San Francisco*, 992 F.Supp. 1149 (N.D.Cal. 1998), aff'd in pertinent part, 266 F.3d 1064 (9th Cir. 2001); see also *S.D. Myers v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001).
15. See *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995) (internal quotations and citation omitted).
16. Id.
17. Id. (citations omitted).
18. Cintas put into evidence in part the following: that Cintas has no facilities in Hayward; that ninety percent of its workforce at its San Leandro facility lives outside Hayward; that no production worker ever enters Hayward on behalf of Cintas; that Cintas' drivers who have collected/delivered laundry to Hayward numbered no more than three; and that Hayward is only one among many of its

customers served by its San Leandro facilities. The plaintiffs objected to these assertions because they did not have a reasonable opportunity to conduct discovery; while the court characterized the objections as "well taken," the court nevertheless assumed those facts to be undisputed for purposes of the Article XI, Section 7 challenge.

19. See *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61 (1969).
20. Article XI, Section 5(a) provides as follows: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."
21. See *Bishop*, supra note 19 at 61.
22. 179 Cal. 291 (1918).
23. See also *City of Oakland*, supra note 13 at 642.
24. See *Associated Builders & Contractors, Inc. v. San Francisco Airport Com.*, 21 Cal. 4th 352 (1999).
25. Id. at 364.
26. The Berkeley Marina consists of land held in the public trust by Berkeley as a trustee. Employers located on land within the Marina must lease such land from the city.
27. *RUI One Corporation*, supra note 3 at 1147 (citations and internal quotations omitted).
28. Id. (citation omitted).
29. Id. at 1149 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977)).
30. Id. at 1156.
31. Id. at 1157 (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)).
32. Id. at 1156-7.
33. *New Mexicans for Free Enterprise et al.*, supra note 4.

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# Qualified Immunity in the Ninth Circuit: An Affirmative Defense in Search of a Coherent Standard

By Mark L. Mosley, Esq.\*

In the Ninth Circuit, the qualified immunity doctrine can bring as much frustration as hope for practitioners defending public employees against federal civil rights claims. Over the past thirty years, the Supreme Court has encouraged public employees to exercise their discretionary authority by immunizing them against “borderline” lawsuits claiming they have violated someone’s constitutional rights. The Supreme Court’s “objective reasonableness” standard, which takes the employee’s good faith out of the analysis, permits public officials to obtain a favorable judgment early in the litigation, at the pleading stage or on summary judgment, by showing that their actions were not inherently unreasonable under the circumstances. Its decisions have also empowered defendants to bring immediate interlocutory appeals from a district court’s denial of qualified immunity.

Unfortunately, the Ninth Circuit has made application of the immunity more complicated than necessary by applying Supreme Court precedents in an incoherent and inconsistent manner. As a result, district courts in this circuit have struggled mightily, and not always successfully, to balance the immunity’s competing values through a maze of abstract and contradictory rules. Many, if not most, high exposure civil rights cases where qualified immunity is an issue ultimately get decided on appeal, requiring defense counsel to take steps throughout the litigation to develop the necessary record. The tasks of presenting and preserving the defense pose sophisticated challenges for even the most experienced practitioners defending public officials against federal civil rights claims.

This article summarizes the qualified immunity doctrine and provides practical advice for defense counsel to help them assert and preserve the immunity throughout all stages of litigation.

## I. WHAT IS QUALIFIED IMMUNITY?

Qualified immunity is a judicially created affirmative defense that, when established, requires the district court to dismiss a lawsuit seeking money damages<sup>1</sup> against a federal, state or local public official accused of violating the plaintiff’s federal statutory or constitutional rights. It applies whenever the official was reasonably exercising discretionary functions within the course and scope of her employment.

Because qualified immunity is an affirmative defense, it must be pleaded and proven by the defendant.<sup>2</sup> Unfortunately, this is where the confusion starts. Both the Supreme Court and the Ninth Circuit have held that, once a defendant raises the issue of qualified immunity by establishing that the conduct complained of was within her discretionary authority, the “burden” shifts to the plaintiff to “prove” that the right allegedly violated was “clearly established” at the time of the occurrence at issue.<sup>3</sup> However, in *Act Up!/Portland v. Bagley*,<sup>4</sup> the Ninth Circuit acknowledged the obvious point that “[t]he threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court.”<sup>5</sup> It makes no sense to assign either party the burden of proving a legal issue. Consequently, practitioners have little to guide them in figuring out how to meet their burden, and district courts have no coherent legal standard for ascertaining when that burden has been satisfied. Until we get further guidance from the appellate courts, defense counsel may wish to argue that this burden-shifting mechanism is simply a means of assuring that “close calls”—areas where the clarity of the law is uncertain—should be decided in favor of the defendants.

Qualified immunity can be asserted by any federal, state or local public official sued for violating a right protected by the federal

constitution or any federal statute.<sup>6</sup> The immunity applies to any public employee, from high level elected officials to police officers to low level administrators and clerks, so long as the act or omission exposing them to liability falls within their discretionary authority.<sup>7</sup> However, a *public entity* cannot assert the immunity of its officers or agents as a defense to liability.<sup>8</sup> Nor, so far, can employees of contractors doing government work.<sup>9</sup>

To assert the defense effectively, counsel must be aware of the purpose the immunity was created to serve and effectively exploit the Supreme Court’s ample language supporting the immunity when presenting the issue to the district court.

Qualified immunity is designed to promote the effective exercise of discretion by public officials, which is chilled when public officials are too easily required to defend themselves against baseless or insubstantial lawsuits. The immunity reflects the Supreme Court’s “attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’”<sup>10</sup>

Consequently, as a matter of public policy, qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”<sup>11</sup> “This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued.”<sup>12</sup>

Counsel must be aware—and must make the district court aware—that qualified immunity is an *immunity from suit*, not a mere defense to liability.<sup>13</sup> As such, the immunity is “effectively lost if a case is erroneously permitted to go to trial.”<sup>14</sup> Counsel must therefore present issues relating to qualified immunity for resolution “at the earliest

possible stage in litigation.”<sup>15</sup> Although this will typically be by way of a Rule 12 motion or a motion for summary judgment, qualified immunity can also be asserted at trial, or even by way of a post-trial motion.<sup>16</sup>

## II. WHAT MUST BE PROVEN?

On its face, the legal standard for qualified immunity as articulated by the Supreme Court seems deceptively straightforward: “Defendants will not be immune if, on an objective basis,”<sup>17</sup> it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.”<sup>18</sup> Unfortunately, when the lower courts have tried to apply this standard to particular factual situations, the result has often approached chaos.

Prior to 2001, most courts (including the Ninth Circuit) generally applied a two-part test to determine whether the immunity applied in a particular case. In the first step, the courts asked whether the law governing the official’s conduct was “clearly established.” In step two, the courts asked whether, given the clearly established standard, a reasonable official could believe that her conduct was lawful.<sup>19</sup> However, in *Saucier v. Katz*,<sup>20</sup> the Supreme Court provided “guidance” that appears to have generated more confusion than coherence.<sup>21</sup>

Under *Saucier*, the Supreme Court applied a new two-step analysis that reversed the order of, and modified somewhat, the prior test. Under the new test, a court must first ascertain (as a “threshold question”) whether, “[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer’s conduct violated a constitutional right.”<sup>22</sup> If so, “the next, sequential step is to ask whether the right was clearly established”—an inquiry that “must be undertaken in light of the specific context of the case, not as a broad general proposition.”<sup>23</sup>

The lower courts have continued to encounter the greatest difficulty in determining whether the right in question is “clearly established.” Under reasonably consistent Supreme Court precedent, the analysis on this point requires the court to ascertain whether:

“[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that

an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”<sup>24</sup>

As the Court put it in *Saucier*, “[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”<sup>25</sup>

The Ninth Circuit has had as much trouble as any of the circuits, and more than most, applying *Saucier* consistently. Some decisions try to graft the old two-part test onto the *Saucier* analysis, resulting in a three-step test: (1) “Taken in the light most favorable to the party asserting the injury, do the facts alleged show the official’s conduct violated a constitutional right?”<sup>26</sup> (2) “Was the law governing the state official’s conduct clearly established?”; and (3) “Under that law could a reasonable state official have believed his conduct was lawful?”<sup>27</sup> Others construe *Saucier*’s second step extremely narrowly as a purely hypothetical inquiry into whether, *had the defendant known all of the facts*, she reasonably could have believed that her actions were lawful.<sup>28</sup>

Even more troubling, however, is the Ninth Circuit’s tendency to deny summary judgment on qualified immunity whenever it finds conflicts in evidence that is relevant to the reasonableness of the defendant’s conduct. In this area, the Ninth Circuit has departed from the majority of the other circuits. Under the majority rule, the procedure on summary judgment requires the trial court to resolve all controverted evidence in favor of the plaintiff and then grant immunity to the defendant if, *on that version of the facts*, a reasonable official could have believed that the defendant’s actions were lawful.<sup>29</sup> However, the Ninth Circuit (along with some panels of the Third, Eighth and Tenth Circuits) has held that *any disputed material facts* relevant to the reasonableness of the defendant’s conduct is sufficient to defeat qualified immunity at the summary judgment stage.<sup>30</sup> The Ninth Circuit’s approach effectively eliminates qualified immunity at the summary judgment stage because, if a defendant is not entitled to immunity unless she can establish that her conduct was reasonable *as a matter of law*—i.e., that there are no triable issues of fact over the reasonableness of her conduct—the immunity

is not needed because there was no constitutional violation in the first place.

## III. ASSERTING THE IMMUNITY

As noted above, qualified immunity is an affirmative defense and therefore must be alleged in the answer (or Rule 12 motion) filed on behalf of any public official who has been sued in her individual capacity.<sup>31</sup> Although the defense can be asserted in a motion to dismiss, the most common procedure is to present the issue to the court by way of a motion for summary judgment. If requested, federal judges familiar with the defense will often schedule an early summary judgment hearing date and limit initial discovery to issues relevant to the immunity. Therefore, defense counsel who think they may have a viable qualified immunity defense should make this request at the initial case management conference.

Because qualified immunity is an objective standard, nothing about the official’s training, judgment or experience is relevant to the inquiry; the test is whether a hypothetical “reasonable official” confronted by identical circumstances as the defendant could have acted in the same way. Defense counsel should therefore ask the court to restrict initial discovery to the events and circumstances surrounding the incident or events alleged to have given rise to liability. If granted, this will achieve one of the central policy objectives of qualified immunity by protecting the public employee defendant from one of the more intrusive burdens of litigation while the immunity issue is being adjudicated.

Counsel must also take care to present a carefully selected evidentiary record to the district court when moving for summary judgment because there is a good chance the record will be scrutinized on appeal. Under the majority rule (which has not yet been, but may soon be, adopted in the Ninth Circuit<sup>32</sup>), the district court will resolve all substantially controverted facts in favor of the plaintiff and then decide the immunity based on that version of events. Consequently, in this initial stage defense counsel should carefully consider whether to delay deposing potentially harmful witnesses because deposing them early may develop evidence that raises triable factual issues that, for summary judgment purposes, must be decided in favor of the plaintiff. Defense counsel should also bring this motion as early as possible, so as to minimize the likelihood that the plaintiffs will have time to uncover such evidence on their own.

If the district court denies summary judgment, the form of order can be critical to the defendant's success on appeal. In *Jeffers v. Gomez*,<sup>33</sup> the Ninth Circuit, relying on *Johnson v. Jones*<sup>34</sup> and *Behrens v. Pelletier*,<sup>35</sup> took the position that a district court's finding of substantial evidence sufficient to raise a triable issue of fact with respect to the qualified immunity defense *cannot be reviewed* on an interlocutory appeal.<sup>36</sup> Therefore, the preferable order for the defendant is one that summarily denies summary judgment without specifying the specific controverted facts upon which the ruling is based, thus giving defense counsel the greatest possible latitude to argue the factual record on appeal.<sup>37</sup>

Pretrial orders denying motions asserting claims of qualified immunity can be immediately appealed under the "collateral order doctrine."<sup>38</sup> Moreover, a defendant may file *more than one* interlocutory appeal—for example, a defendant may file an appeal from a denial of a motion to dismiss and, if unsuccessful, appeal again from a subsequent denial of a motion for summary judgment.<sup>39</sup>

The filing of the notice of appeal divests the district court of jurisdiction over the case.<sup>40</sup> However, under *Behrens v. Pelletier*, the Supreme Court approved of the Ninth Circuit's practice of enabling the district courts to retain jurisdiction while the appeal is pending where the qualified immunity claim is "frivolous or has been waived."<sup>41</sup>

A defendant who has lost her motion for summary judgment on qualified immunity not only can, but should, reassert the immunity at trial to avoid an argument that she has waived it. The open question is whether the immunity issue should be resolved by the judge or the jury; there is a split among the circuits on this issue,<sup>42</sup> and the Ninth Circuit has thus far avoided answering this question.<sup>43</sup> If you find yourself in trial on a qualified immunity case, you could consider asking your judge to submit advisory interrogatories to the jury on the factual issues that are material to the qualified immunity question. That way, if you subsequently wind up on appeal, you may have a stronger basis for arguing that the district court erred when it refused to grant qualified immunity at trial.

## CONCLUSION

Although the law in this area can be frustrating, qualified immunity is still one of the most potent weapons in defense counsel's

arsenal when defending a public employee against a federal civil rights claim. Counsel must be careful to assert the immunity and to adjudicate it effectively, and above all to protect the record for appeal. We are hopeful that the Supreme Court and the Ninth Circuit will soon clarify the law to make application of the immunity more straightforward, thereby helping to achieve the immunity's fundamental purpose of encouraging public employees in the effective exercise of their discretionary authority.

## ENDNOTES

1. Qualified immunity cannot be asserted to bar actions for declaratory or injunctive relief. *American Fire v. Gillespie*, 932 F.2d 816, 818 (9th Cir.1991).
2. *Gomez v. Toledo*, 446 U.S. 635 (1980).
3. *Davis v. Scherer*, 468 U.S. 183, 197 (1984); see also *Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir. 1991), rev'd on other grounds 510 U.S. 510 (1994) (outlining extent of the plaintiff's "burden" to demonstrate the law was "clearly established").
4. 988 F.2d 868 (9th Cir. 1993).
5. *Id.* at 873 (citation omitted).
6. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n. 30 (1982) (it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U.S.C.] § 1983 and suits brought directly under the Constitution against federal officials") (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).
7. *Anderson v. Creighton*, 483 U.S. 635, 642 (1987).
8. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980).
9. *Bibeau v. Pacific Northwest Research Foundation*, 188 F.3d 1105, 1111-1112 (9th Cir. 1999).
10. *Harlow*, supra note 6 at 807 (quoting *Scheuer v. Rhodes*, 416 U.S. 232 (1974)); see also *Elder v. Holloway*, 510 U.S. 510, 514 (1994) ("[t]he central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability'" (quoting *Harlow*, supra 6 at 806); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1098-1099 (9th Cir. 1995).
11. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

12. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (citation and internal quotation marks omitted).
13. *Id.* at 227.
14. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).
15. *Hunter*, supra note 12 at 227.
16. *Cf. Curley v. Klem*, 298 F.3d 271, 278 n. 3 (3rd Cir. 2002) (recognizing split in circuits over whether court presented with qualified immunity issue at trial should decide the issue itself or submit the issue to the jury).
17. The Supreme Court adopted the "objective reasonableness" standard in *Harlow*, supra note 6 at 819, in place of the prior "good faith" standard, in order to permit the defeat of insubstantial claims without resort to trial. Unfortunately, the substitution has not been complete. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), a prisoner alleged that officials had lost his property in retaliation for his frequent use of the courts to challenge the conditions of his confinement. The plaintiff's First Amendment claim required the plaintiff to prove that the defendants acted with a retaliatory motive. The Supreme Court recognized that "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case." *Id.* at 589. The Ninth Circuit has seized upon this exception, holding in one case that because an officer's "good faith" is an element of the underlying Eighth Amendment claim, it is to be considered as part of the qualified immunity decision. *Marquez v. Gutierrez*, 322 F.3d 689, 691-692 (9th Cir. 2003). In another case, the Ninth Circuit held that an official's reliance on an attorney's advice is relevant to help establish the reasonableness of an official's belief that her actions are lawful. *Stevens v. Rose*, 298 F.3d 880, 884 (9th Cir. 2002); cf. *Jeffers v. Gomez*, 267 F.3d 895, 911 (9th Cir. 2001). Under an objective standard, of course, what the officer actually believed is irrelevant, so inquiries into the officer's "good faith" or what the officer may have learned from counsel should have no bearing on the qualified immunity question.
18. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); see also *Anderson*, supra note 7 at 641 ("the objective (albeit fact-specific)

question [is] whether a reasonable officer could have believed [the defendant's actions] to be lawful, in light of clearly established law and the information the [defendant] possessed").

19. See *Biggs v. Best*, Best & Krieger, 189 F.3d 989, 994 (9th Cir. 1999) (citing *Ortega v. O'Connor*, 146 F.3d 1149, 1154 (9th Cir.1998)); *Act Up!/Portland v. Bagley*, supra note 4 at 871.
20. 533 U.S. 194 (2001).
21. A Westlaw search limited to federal circuit court of appeals decisions reveals that in less than four months—between January 1 and April 26, 2004—59 circuit courts have published decisions trying to make sense of the new *Saucier* standard.
22. *Saucier*, supra note 20 at 201. The Supreme Court's use of the word "alleged" is imprecise because it suggests that this determination can be made by reference only to the complaint. The Supreme Court subsequently clarified that it would answer this question by reference to "the parties' submissions," construing all controverted facts most favorably to the non-moving party. *Id.*
23. *Id.* (emphasis added).
24. *Anderson*, supra note 18 at 640 (citations omitted); see also *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir. 1992) ("We consider the law to be 'clearly established' when it is well-developed enough to inform [a] reasonable official that his conduct violates the law").
25. *Saucier*, supra note 20 at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).
26. *Id.* at 201.
27. *Marquez*, supra note 17 at 692 (quoting *Jeffers*, supra note 17 at 910); accord, *Schneider v. California Dept. of Corrections*, 345 F.3d 716, 721 (9th Cir. 2003). In *Marquez*, the defendant, a prison guard, shot the plaintiff, an inmate, while the plaintiff stood near a fight between other inmates. The Ninth Circuit (O'Scannlain, J.) found that law was clear that "[t]o shoot a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm" stated a violation of the plaintiff's Eighth Amendment rights. *Marquez* at 692. However, the court also found that a reasonable officer could misperceive that plaintiff was kicking

another inmate, therefore threatening the other inmate with death or serious harm. Therefore, the officer was entitled to qualified immunity.

28. *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003). In *Wilkins*, the defendants, two Oakland police officers, shot and killed an undercover officer who was making an arrest when they mistook him for a criminal suspect about to shoot an unarmed man. The court reasoned that, had the two officers known the undercover officer was actually a police officer, they could not have believed that shooting him was reasonable, and therefore the court did not need to reach the second step in the *Saucier* analysis. *Id.* at 955. Apparently no other court has interpreted the second step in *Saucier* so narrowly.
29. See, e.g., *Estep v. Dallas County, Tex.*, 310 F.3d 353, 361 (5th Cir. 2002); *Scott v. Clay County, Tenn.*, 205 F.3d 867, 877 (6th Cir. 2000).
30. See *Wilkins*, supra note 28; see also *Kopec v. Tate*, 361 F.3d 772, 777 (3rd Cir. 2004); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1314 (10th Cir. 2002); *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002).
31. A suit against an official in her "official" capacity is treated as a suit against the entity. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). The entity cannot assert the qualified immunity defense. See note 8, supra, and accompanying text.
32. The defendants in *Wilkins*, supra note 28, have petitioned the Supreme Court for certiorari on this issue.
33. *Jeffers*, supra note 17.
34. 515 U.S. 304 (1995).
35. 516 U.S. 299 (1996).
36. *Jeffers*, supra note 17 at 903; see also *Wilkins*, supra note 28 at 951.
37. Regardless of the form of the order defendants can always argue on appeal the *materiality* of disputed factual issues found by the trial court to defeat summary judgment, because that is a purely legal question. See *Jeffers*, supra note 17 at 905; *Cunningham v. Gates*, 229 F.3d 1271, 1286 (9th Cir. 2000); *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996).
38. *Mitchell*, supra note 14; see also *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998) (allowing appeal from order

denying motion to dismiss); *Billington v. Smith*, 292 F.3d 1177, 1183-1184 (9th Cir. 2002) (allowing appeal from denial of motion for summary judgment).

39. *Behrens*, supra note 35. Indeed, there does not appear to be any limit to the number of times a defendant can move for summary judgment on qualified immunity, so long as the evidence presented in any subsequent motion is different. For example, if the court denies summary judgment because it finds a dispute in the evidence on a critical material fact requires that fact to be decided in the plaintiff's favor, and the defendant subsequently obtains additional evidence (such as an admission by plaintiff) that resolves that issue in the defendant's favor, a subsequent motion, or at least a motion for reconsideration, may be appropriate.
40. *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1987).
41. *Behrens*, supra note 35 at 310-1.
42. See *Curley v. Klem*, 298 F.3d 271, 278, n. 3 (3rd Cir. 2002) (recognizing the split and listing the lead cases).
43. See *Resnick v. Adams*, 348 F.3d 763, 771 n. 9 (9th Cir. 2003); *Sloman v. Tadlock*, 21 F.3d 1462, 1467-68 (9th Cir. 1994); but see *Ortega*, supra note 19 at 1154 ("Courts should decide issues of qualified immunity as early in the proceedings as possible, but when the answer depends on genuinely disputed issues of material fact, the court must submit the fact-related issues to the jury.") (citations omitted).

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# A Pitchess Motion Primer

By Patrick K. Bobko, Esq.\*

## I. THE SCENARIO

At approximately 6:18 a.m., police officers from Falcon City, California executed a search warrant at 1234 Main Street.<sup>1</sup> The house purportedly belonged to the girlfriend of Archie Villain, the man Falcon City Police believed to be the head of a local gang. The officers involved in the raid were part of a task force designed to combat the upswing in gang activity and the ever-increasing methamphetamine trade that accompanied it. County sheriffs were part of the task force and accompanied the Falcon City police on the raid.

The lead officer and head of the task force was Detective Joe Headstrong, a 10-year veteran with special training in anti-gang and narcotics enforcement. Headstrong had been following Archie Villain for months and had information from a confidential informant that Villain would be at his girlfriend's home at this particular time. The informant also told Headstrong that Villain had just received a large quantity of methamphetamine, and that he was using his girlfriend's house as a base of operations to package and sell the drug. In fact, the informant told Headstrong that he had purchased a small quantity of methamphetamine from Villain at the house the day before.

Based on this information, Headstrong made an affidavit and obtained a search warrant for Villain's girlfriend's house.

When the task force officers entered the house Villain was nowhere to be found. However, Sheriff Nick Quickfoot did find a man in the garage among what prosecutors would later call "the largest methamphetamine distribution operation ever found in Falcon City." The man in the garage (subsequently identified as Pete Aufender, Villain's cousin and known fellow gang-member) was plainly startled at Johnny Law's unannounced appearance at this early hour, but Aufender's state of shock was quickly overcome by an overwhelming urge to escape. Unfortunately for Aufender, Sheriff Quickfoot was just a little bit faster and caught him. After a brief but intense struggle, Quickfoot subdued and

arrested Aufender. (Quickfoot's arrest report would state that Aufender resisted arrest violently, and that he was forced to use his baton to effectuate the arrest.) Falcon City Police Officer Will Newbie arrived at the end of the struggle and helped Sheriff Quickfoot put Aufender in the patrol car.

In addition to the stash found in the garage, a subsequent search of the house uncovered more than 1,000 individually packaged ampules of methamphetamine in the bedroom closet, numerous glass smoking pipes on the kitchen table and bedroom night stand, three digital scales with methamphetamine residue on them, a warehouse-sized box of small zip-lock bags, two unregistered pistols, and over \$13,000 in small bills in trash bags in a clothes hamper. The search also disclosed various papers and personal effects belonging to Villain in the bedroom.

A short time later, Detective Headstrong went to Villain's place of work and arrested him.

A few weeks later, the district attorney ("DA") filed a criminal complaint against Aufender and Villain alleging a host of offenses ranging from distribution of controlled substances to illegal possession of firearms.

(This sounds like an open-shut case, doesn't it?)

A few months after filing the complaints, the DA learned at a preliminary hearing that Detective Headstrong had resigned from the Falcon City Police Department and was now working a civilian job in a nearby community. The DA was unaware of the circumstances surrounding the resignation, but from conversations with Headstrong, found out that he was not fired and that he was still willing to testify against Villain and Aufender at trial.

(One paragraph later and it is not quite the dead-bang winner it once appeared, is it?)

In the time between the raid on Villain's house and trial, Headstrong was forced to resign from the Falcon City Police Department because of a sticky incident

involving false entries on a timecard, his wife, his girlfriend and an ill-advised weekend trip to Cabo San Lucas with the latter. Once the matter was finally put to rest, the investigation by the Falcon City Police Department's Internal Affairs Division found that two other Falcon City police officers had tried to cover for Headstrong. The other two officers were suspended without pay for a number of days but were allowed to stay with the department.

(Is the little alarm-in-your-head ringing like an air raid claxon?)

Then came the Pitchess motions.<sup>2</sup>

## II. WHAT IS A PITCHESS MOTION?

Pitchess motions are discovery motions aimed at obtaining information about specific police officers from their personnel files in order to impeach them at trial. The Pitchess procedure applies in both civil and criminal cases.<sup>3</sup>

The statutory scheme for Pitchess motions is set forth at Evidence Code Sections 1043 through 1047, and Penal Code Sections 832.5, 832.7 and 832.8.<sup>4</sup> These sections specify that a defendant must file a "written motion" identifying the proceeding, the party seeking disclosure, the peace officer (who must be notified of the motion at least 21 days in advance of the hearing pursuant to Code of Civil Procedure Section 1005(b)), the time and place of the hearing, and the governmental agency with control of the records sought.<sup>5</sup> Additionally, the motion must include affidavits showing "good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation."<sup>6</sup> No hearing may be held without compliance with these procedures.<sup>7</sup>

As a practical matter, the declaration supporting the Pitchess motion is the whiskey in the highball. It is from the declaration that the court must determine whether the defendant has met the relatively low threshold showing of "good cause" for the requested

discovery. The declaration must set forth a “specific factual scenario” (i.e., what specific misconduct is alleged) establishing a “plausible factual foundation” that allows the court to assess whether the requested items are material to the “subject matter involved in the pending litigation.”<sup>8</sup> And although many times overlooked by courts, this showing is crucially important because it determines the scope of any disclosure and prevents “fishing expeditions” by defense counsel.<sup>9</sup> Stated simply, the defendant is only entitled to information germane to the allegations contained in the declaration.

If the defendant makes a showing of “good cause,” the court then conducts in camera review of the records to determine whether they have any relevance to the litigation.<sup>10</sup> And certain information is expressly prohibited from disclosure, including information over five years old, conclusions of investigating officers and facts “so remote as to make disclosure of little or no practical benefit.” Generally speaking, once the court has determined that “good cause” exists for the in camera review, it has tremendous latitude in deciding what gets turned over to the defendant.

Back to the story.

### III. VILLAIN'S PITCHESS MOTION

#### A. DEFENDANT'S DECLARATION

Suspecting that where there is smoke there is fire, Villain's counsel brought a Pitchess motion seeking all information in Detective Headstrong's personnel files, or any other police department records, relating to his credibility and honesty.

In support of the motion, Villain's counsel attached a declaration stating that counsel had reason to believe that Detective Headstrong had resigned from the Falcon City Police Department “under a cloud” and that counsel had a right to know the reasons for his departure. Villain's counsel stated that, if the reasons had anything to do with the detective's credibility or honesty, this information was pertinent to the defense and must therefore be disclosed for impeachment purposes.

Counsel's declaration further alleged that Villain did not sell methamphetamine from his girlfriend's house, that it was not *his* house, and that he had no idea that anything of the sort was going on there. According to the declaration, “Mr. Villain only stayed at his

girlfriend's house occasionally, and had not been at the residence for the past few days because the couple was fighting. Mr. Villain had been staying at his mother's home nearby.” The declaration also said that “Mr. Villain was not at the house when the alleged sale to the police's confidential informant took place, and the facts contained in Detective Headstrong's affidavit are untruthful and false.”

Villain upped the ante even further, contending that the information sought in the Pitchess motion would also be useful in a corresponding motion to suppress. Villain stated that any information showing Detective Headstrong had a propensity to be untruthful would directly support the claim that the search warrant was obtained under false pretenses because the detective lied on the affidavit. Defendant argued that if the affidavit was false, the search was illegal, and all the fruits of the illegal search must be excluded.<sup>11</sup>

#### B. THE ISSUES

1. *Detective Headstrong is no longer employed by the Falcon City Police Department. Can Villain file a Pitchess motion seeking information about a former officer?*

Yes. The courts have held that an agency may be forced to produce records for an officer who is no longer employed by it.<sup>12</sup> In fact, the court of appeal recently held in *Abatti v. Superior Court*<sup>13</sup> that a criminal defendant could file a Pitchess motion to obtain records of a former police officer who was no longer even in law enforcement. In *Abatti*, the former police officer was working a civilian job and was a percipient witness whom the prosecution intended to call at trial. The former police officer's personnel files contained information the defendant wanted for impeachment purposes, and the court required disclosure.

Assuming the court finds good cause, Detective Headstrong's personnel files are discoverable even though he is no longer employed by the Falcon City Police Department.

2. *Aren't Pitchess motions for cases involving claims of excessive force? Can Villain file a Pitchess motion seeking information solely for the purposes of impeaching the officer?*

Again, yes. Although Pitchess motions have traditionally been used to discover police misconduct when a defendant is charged with

some sort of assaultive conduct against police where the officer's alleged propensity to use excessive force would be relevant to a defendant's claim of self-defense, defense counsel (and the courts) have expanded their scope to issues involving dishonesty and credibility that can be used to impeach an officer at trial.<sup>14</sup> It does not matter that Villain's Pitchess motion makes no claims regarding excessive force or violent behavior by the Falcon City police.

Additionally, in our scenario, Villain's motion seeks information for use in challenging the facts contained in an affidavit for a search warrant. The court of appeal recently held in *Brant v. Superior Court*<sup>15</sup> that Pitchess discovery “is appropriate when a defendant seeks information to assist in a motion to suppress.”<sup>16</sup>

3. *Can Villain's counsel support the Pitchess motion with a declaration based on information and belief?*

Absolutely. In fact, it is unlikely that defense counsel would submit anything other than an affidavit based on information and belief in support of a Pitchess motion for fear of disclosing information that could then be used against the defendant at trial.<sup>17</sup> In *City of Santa Cruz v. Municipal Court*,<sup>18</sup> the California Supreme Court established that the declaration supporting a Pitchess motion could be made on “information and belief” by defense counsel. The court explained that declarations based on information and belief were not unusual and that the use of such declarations was permissible “where the facts would otherwise be difficult or impossible to establish.”<sup>19</sup>

4. *Does the declaration supporting Villain's Pitchess motion establish “good cause” for the requested disclosures?*

This is always the \$64,000 question, but here the answer is: probably. The courts have repeatedly said that Evidence Code Section 1043 establishes a “relatively low threshold” for discovery and does not require the defendant to spell out a precise alternative theory.<sup>20</sup> Read in conjunction with the police reports,<sup>21</sup> the declaration accompanying Villain's motion arguably provides a “specific factual scenario” establishing a “plausible factual foundation” supporting the claim of officer dishonesty sufficient to obtain the requested discovery because the declaration paints a reasonable alternative version of events that, if true, renders the officer's

version of events suspect and places his credibility directly at issue. To wit: Villain was not arrested at the house, and other than the information contained in Detective Headstrong's controverted declaration, there was no proof that Villain had been at the house in recent days.<sup>22</sup>

5. *Will the defense get the information concerning Detective Headstrong's resignation?*

It is always hard to predict what different courts will do, but here the answer is: probably. Although each case rises and falls on its own facts, because Headstrong's ill-advised interlude in Cabo involved falsifying records, most courts would likely find that information discoverable. Most (if not all) defense counsel would argue that Headstrong's falsifying an official document (a time card) is proof that he is willing to lie on official documents, is probative of his credibility, and can therefore be used for impeachment at trial.

Likewise, Villain could use the fact that Headstrong filed false time cards—and was therefore untrustworthy and had a propensity for lying—in his motion to suppress.

Of course, the information about Detective Headstrong's resignation, even in the hands of a modestly competent defense attorney, is potentially devastating.<sup>23</sup>

6. *So what, exactly, does the court turn over to Villain's counsel?*

Based on established case law, the court will normally order only the name, address and phone number of the complainant turned over to the defense, and the information must

be provided pursuant to a protective order if requested by the agency.<sup>24</sup>

In this case, depending on how the time card incident was brought to the Falcon City Police Department's attention, Villain's counsel would probably get the name, phone number and last known address of Detective Headstrong's ex-wife and/or former-girlfriend, and the names of the two other Falcon City police officers implicated in the incident.<sup>25</sup> It is then up to Villain's counsel to develop from these witnesses whatever information he can.

However, if there was no civilian "complainant" but instead the Falcon City Police Department initiated the investigation, Villain's counsel would likely get the name and phone number of a department internal affairs officer as the complaining witness. Naturally, internal affairs officers are unwilling to speak with defense counsel. Ever. About anything.

And this leaves Villain in a bind. Normally, courts will not require that the officer's actual file (or reports it contains) be turned over to the defense.<sup>26</sup> But when defense counsel gets stonewalled, courts will typically take some further action to ensure the defendant gets access to the information contained in the officer's records. One such measure would be to order the agency to redact and turn over the pertinent reports (or records) to the defense.<sup>27</sup>

#### IV. AUFENDER'S PITCHCESS MOTION

##### A. THE DECLARATION

Aufender's counsel also filed Pitchcess motions against Sheriff Quickfoot and Officer Newbie, claiming that they used excessive

force in arresting Aufender. (In addition to the drug and weapons charges, the DA charged Aufender with resisting arrest.) The declaration accompanying Aufender's Pitchcess motions stated that Sheriff Quickfoot and Officer Newbie used excessive force in effectuating his arrest by "striking him repeatedly with a baton long after Mr. Aufender had surrendered." The declaration also says that, because Aufender was on the ground covering his face, "he could not see which of the officers was striking him, but believes that both took turns hitting him while he was in a prone position."

##### B. THE ISSUES

1. *Can Aufender name Officer Newbie in his motion even though his fight was with Sheriff Quickfoot?*

Yes. Courts are likely to grant discovery regarding all the officers who are either directly or indirectly involved in the "fracas."<sup>28</sup> It probably will not matter for purposes of Aufender's motion that Newbie was not actually involved in the fight and never struck a blow. Odds are he was close enough to put his records at risk.

2. *Does it matter that Sheriff Quickfoot is from a different agency than Officer Newbie?*

Not for purposes of Aufender's motion. However, because there are two separate agencies involved, Aufender would have to file two separate motions; one with Falcon City and the other with the county. The agencies would respond separately.

If, however, Aufender's counsel only filed a motion against the county but named Officer

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Newbie in the motion, he would not be able to obtain any information from Falcon City since it was not properly noticed of the motion.

3. *Can Falcon City share whatever it discloses to Aufender's counsel with the prosecution?*

The counter-intuitive answer is: no. The California Supreme Court's recent decision in *Alford v. Superior Court*<sup>29</sup> established that the prosecutor stands in no better position than the defendant with respect to information contained in a police officer's files. The court said:

"Nor do we find statutory authority to compel the defense or the trial court to share with the prosecution the fruits of a successful Pitchess motion. The prosecution is entitled to discovery from the defense only in accordance with Penal Code sections 1054.3 and 1054.7. *Of course, the prosecution itself remains free to seek Pitchess disclosure by complying with the procedure set forth in Evidence Code sections 1043 and 1045. Absent such compliance . . . peace officer personnel records retain their confidentiality vis-a-vis the prosecution.*"<sup>30</sup>

Bottom line: if the DA wants to get information from the officer's personnel file, he has to file a Pitchess motion too.<sup>31</sup>

## CONCLUSION

In the scenario above, as in almost every situation, the outcome of the Pitchess motion will have a huge impact on the outcome of the case. What does this mean for local governments?

For one, it means that they can expect to see a deluge of Pitchess motions. Increasingly, defense counsel are bringing Pitchess motions as a matter of course, and there is no reason to believe the trend will stop any time soon.

More importantly, defendants' increased use of the Pitchess motion process places more importance on the information in an officer's records. More to the point, adverse information in an officer's personnel file has the potential to severely undermine the officer's effectiveness in the field.

Going back to our scenario, Detective Headstrong's dalliance in Cabo may have severely undermined the DA's ability to prosecute Villain's and Aufender's case because the DA knows that—at some

point—Headstrong must be put on the stand and subjected to cross-examination. And this will probably not rank with that boyhood trip to Disneyland or first time he shot par on Headstrong's list of pleasant life experiences.

Nor is the impact of Detective Headstrong's impropriety limited to the effect it will have on the DA's ability to prosecute the Villain/Aufender case. Once word gets out that Headstrong is no longer on the Falcon City Police Department (and word will get out) every defense lawyer whose client was arrested by Headstrong (or the two officers implicated in the cover-up) will bring a motion aimed at getting the information about his resignation. The damage thus could spread to every case Headstrong was involved in throughout his career.

## ENDNOTES

1. The factual scenario is (generally) fictional and any resemblance to actual persons or events is (not entirely) coincidental.
2. Pitchess motions derive their name from *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974).
3. *Fletcher v. Superior Court*, 100 Cal.App.4th 386, 390 (2002) ("The Pitchess procedure applies in both criminal and civil cases.") (citation omitted). And defendants are not shy about bringing Pitchess motions; the author has recently responded to a Pitchess motion filed by a defendant seeking records regarding a police dog. Believe it or not, some agencies keep separate "police" files on their dogs. Complicating matters further, the police dog had recently retired.
4. Penal Code Section 832.7(a) states: "Peace officer personnel records . . . are confidential and *shall not be disclosed* in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (emphasis added). See also *Craig v. Municipal Court*, 100 Cal.App.3d 69, 77 (1979) ("The custodian [of peace officer records] has the right, *in fact the duty*, to resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted.") (emphasis added).
5. Cal. Evid.C. § 1043 (b)(1).
6. Id. § 1043(b)(3).
7. Id. § 1043(c).
8. *City of San Jose v. Superior Court*, 67 Cal.App.4th 1135, 1146 (1998).
9. The California Supreme Court has instructed that inquiries into peace officer records are bound by the nature of the specific allegations made by the defendant. "On its face, appellant's request for the identities of all complainants of excessive force was overly broad. Since appellant sought the information to bolster his claim of involuntariness in the interrogation setting, *only complaints by persons who alleged coercive techniques in questioning were relevant.*" *People v. Memro*, 38 Cal.3d 658, 685 (1985) (emphasis added). See also *California Highway Patrol v. Superior Court*, 84 Cal.App.4th 1010, 1021 (2000) ("Further, our Supreme Court has indicated that a showing of good cause must be based on a discovery request *which is tailored to the specific officer misconduct that is alleged.*") (emphasis added).
10. Cal. Evid.C. § 1045.
11. Of course, the DA, not the city attorney, will argue these motions. But the outcome of the Pitchess motion will plainly impact the outcome of the case.
12. See *Davis v. City of Sacramento*, 24 Cal.App.4th 393, 400 (1994) ("Because personnel records of a particular officer are presumably generated while the officer is employed by the police department, they are '[r]ecords of peace officers.' They do not cease being such after the officer's retirement.").
13. 112 Cal.App.4th 39 (2003).
14. *People v. Hustead*, 74 Cal.App.4th 410, 417 (1999) ("Pitchess motions are proper for issues relating to credibility") (citations omitted).
15. 108 Cal.App.4th 100 (2003).
16. Id. at 108-9 (citation omitted).
17. It should also be noted that a defendant does not have to commit to one particular defense or story in demonstrating "good cause" for the requested disclosure. As the court of appeal has observed: "Petitioner is not obliged to elect between available defenses for the purpose of presenting a discovery motion. Requiring him to do

so would run into an immediate conflict with the Fifth Amendment.” Kevin L. v. Superior Court, 62 Cal.App.3d 823, 829 (1976).

18. 49 Cal.3d 74 (1989).
19. Id. at 88 (citations omitted).
20. Id. at 83.
21. The case law states that the defendant’s motion should be considered in the context of the factual scenario surrounding the incident. See *City of Santa Cruz*, supra note 18 at 86 (finding that defense counsel’s averments must be “[v]iewed in conjunction with the police reports”); see also *Brant*, supra note 15 at 105 (same). Increasingly, however, it appears that courts pay less and less attention to this requirement.
22. *Brant*, supra note 15 at 108 (“In short, *Brant* challenged the officers’ account of the detention, search and manner in which his confession was obtained by providing his own version of the events, thereby making the officers’ truthfulness material to the issues in the case.”) See also *Haggerty v. Superior Court*, 117 Cal.App.4th 1079, 1087 (2004) (“Although it certainly would have been better for counsel to provide a more

specific articulation of the relevancy connection between the lawsuit and the internal investigation, the trial court could reasonably make the necessary inferences to find that the good cause showing was satisfied.”)

23. In fact, in a case the author handled with facts not too dissimilar from these, the district attorney decided he could not go forward with the case and was forced to dismiss all charges against the defendant.
24. Cal. Evid.C. § 1045(e).
25. But this is not a foregone conclusion. For example, in *California Highway Patrol*, supra note 9, the court of appeal reversed a trial court’s ruling that an incident involving an officer’s time card should be turned over to the defendant where the allegations of misconduct involved excessive force. This is why it is so important for the agency to do its best to limit the scope of the motion to the factually supportable issues.
26. *City of Santa Cruz*, supra note 18 at 84 (“As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead . . . that the agency

reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question.”) (citations omitted).

27. In *Haggerty*, supra note 22, the court of appeal ordered that redacted versions of an internal affairs report be turned over because “the trial court specifically found the disclosure of the witness identities would not provide Guindazola with the substance of the relevant information found in the report.” *Haggerty*, supra note 22 at 1089.
28. *People v. Memro*, supra note 9 at 685-86.
29. 29 Cal.4th 1033 (2003).
30. Id. at 1046. (citations and footnote omitted, emphasis added).
31. Of course, there is no requirement that the motion, however meager it is, be opposed.

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# A Message from the Chair

*By Fazle Rab Quadri, Esq.\**

This is my final message to you as the Chair of the Public Law Section Executive Committee. Please let me express my deep appreciation to all of you who are members of the Public Law Section and to my fellow Committee members for your help in assisting and guiding me in a humbling experience.

Let me draw your attention to the State Bar Annual Meeting scheduled from October 7-10 in Monterey and invite you to attend a ceremony that you will enjoy. Chief Justice Ronald M. George, Supreme Court of California, will present the 2004 Public Lawyer of Year award at 4:00-4:30 p.m. on October 8, 2004 at a reception hosted by your Public Law Section. I hope that you will be able to attend and give me an opportunity to meet you. Your Public Law Section is also sponsoring nine MCLE programs at the Annual Meeting. These programs are: Public Sector Labor Issues; Recent Land Use Law Developments; Federal and State Law Immunities for Public Entities; Local Government Agency Open Meetings Law; So You Think You Know Your Client; Public Official Conflict of Interest; Understanding and Drafting Legislative and Regulatory Language; Campaign and Election Laws; and Federal Civil Rights Act: Qualified Immunity Defense. I hope you will earn some of your MCLE credits at these programs. Your Section receives some pennies for each person who attends a sponsored program.

In parting let me say that you who are public lawyers should not only be proud to be part of a profession that does not hesitate to call a spade, a spade, but you should be specially proud to be part of a group of lawyers who ensures that the government itself stays on the path of law. That which separates America from the rest of the world is uniquely our Bill of Rights with the Constitution that safeguards the civil liberties of our citizens. You as lawyers know so well that it is the Rule of Law in our country that protects every citizen from the tyranny of the strong over the weak or the tyranny by a person in a governmental position over its citizens.

You as public lawyers are the core of the institution we call the Rule of Law. You, when you were a law student, learned to “think like a lawyer” and now you have the skills that make you among the first ones to recognize when anyone, even if it is our government, takes actions contrary to our laws or our values. You have the training, the knowledge and the power to walk into the halls of justice, stand up and speak until the wrong has been made right—and you do it in a class uniquely American and our own. It is an honor and a privilege for me to be a part of your group and our legal profession.

God Bless America!

\* Fazle Rab Quadri ([quadri@mdaqmd.ca.gov](mailto:quadri@mdaqmd.ca.gov)) is General Counsel of the Mojave and Antelope Air Quality Management District in southern California. He is Chair of the Public Law Section Executive Committee.

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